

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**DONAL B. BARRETT,**

***Plaintiff***

**v.**

**JENS-PETER W. BERGEN,**

***Defendant***

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***Docket No. 99-239-P-C***

***RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS  
CLAIM FOR PUNITIVE DAMAGES OR, IN THE ALTERNATIVE, FOR  
SUMMARY JUDGMENT ON CLAIM***

The defendant moves to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), the plaintiff’s claim for punitive damages in this action alleging breach of contract and breach of fiduciary duty or, in the alternative, for summary judgment on that claim. I recommend that the court grant the motion.

There is no question that Maine law applies in this action based on diversity jurisdiction. Under Maine law, punitive damages are not available for breach of contract, no matter how egregious the breach. *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989). Accordingly, the plaintiff may not recover punitive damages on Count I of his complaint, which alleges breach of contract, Complaint (Docket No. 1) ¶ 8, under any circumstances, and the motion to dismiss must be granted as to Count I.

Under Maine law, punitive damages are available “based upon tortious conduct only if the defendant acted with malice.” *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). Malice exists where the defendant’s conduct is motivated by ill will toward the plaintiff or where the defendant’s

deliberate conduct is so outrageous that malice toward the injured plaintiff can be implied. *Id.* Here, the complaint fails to allege malice or conduct so outrageous that malice can be implied. Even when every reasonable inference from the well-pleaded facts in the complaint is drawn in favor of the plaintiff, as required when evaluating a motion to dismiss for failure to state a claim upon which relief may be granted, *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir.1993), the complaint in this case fails to state a claim for punitive damages on Count II.

The plaintiff requests, should his complaint be found lacking in this regard, that he be allowed to amend it. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss or Partial Summary Judgment [sic] ("Plaintiff's Memorandum") (Docket No. 11) at 17. This request, made five weeks before the trial list upon which this action appears is scheduled to begin, four months after the deadline set by this court for amendment of the pleadings, Scheduling Order (Docket No. 3) at 1, and more than a month after the plaintiff, a lawyer himself, Affidavit of Donal B. Barrett, etc. ("Plaintiff's Aff.") (Docket No. 12) ¶ 2, was put on notice of this possible deficiency in his pleading by the defendant's motion to dismiss, is unaccompanied by any proposed amendment and is based on the assertions that the plaintiff "drafted the complaint pro se" and that leave to amend is "favored under the federal rules." Plaintiff's Memorandum at 17. The suggestion that a lawyer who drafts his own complaint when he brings suit himself should be subject to some indulgence from the court with respect to the adequacy of that pleading is disingenuous at best. The general provision of Fed. R. Civ. P. 15(a) that leave to amend a pleading "shall be freely given when justice so requires" must be tempered by respect for the court's orders and its need to control its own docket.

It is unnecessary to deny the plaintiff's motion on the ground of its untimeliness, however, because the plaintiff has failed to demonstrate that any amendment he might make would not be futile.

*Maldonado v. Dominguez*, 137 F.3d 1, 11 (1st Cir. 1998). The plaintiff contends that he gave the defendant, an attorney, a check in the amount of \$130,000 to be given to the defendant's client only upon the defendant's client providing a discharge of the mortgage that was in dispute between the plaintiff and the defendant's client; that, contrary to this "agreement," the defendant gave the check to his client and never obtained a discharge of the mortgage; that the defendant's client retained the \$130,000 and the plaintiff had to file suit in state court in order to obtain the discharge and the return of a portion of the \$130,000; and that the defendant filed in that state court action a memorandum of law and an affidavit of the president of the defendant's client "setting forth what the Defendant knew was a fundamentally inaccurate description of the conditions under which the \$130,000 cashier's check had been tendered." Plaintiff's Aff. ¶¶ 6-8; Plaintiff's Memorandum at 2-3.<sup>1</sup> The plaintiff repeatedly states that *he* infers that the defendant acted with malice toward him, but that is not the legal standard. Where, as here, there is no evidence of actual ill will, the evidence must demonstrate conduct so outrageous that it will allow an objective factfinder to draw a reasonable inference of malice. That evidence must be clear and convincing; a preponderance of the evidence is not enough in this context. *Grover v. Minette-Mills, Inc.*, 638 A.2d 712, 717 (Me. 1994).

Contrary to the plaintiff's position, the mere fact that the parties have engaged in a protracted, vigorously disputed legal proceeding or series of legal proceedings is not sufficient evidence to support an inference that the attorney for one of the parties must harbor ill will toward the other party. The

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<sup>1</sup> To the extent that the plaintiff's claim is based on actions allegedly taken by the defendant in the second state-court proceeding, it should be noted that "[t]he primary purpose of punitive damages is to express society's disapproval of intolerable conduct and to deter such conduct where no other remedy would suffice," *Caron v. Caron*, 577 A.2d 1178, 1180 (Me. 1990) (internal punctuation and citation omitted), and M. R. Civ. P. 11 is designed to provide Maine courts with the power to impose sanctions for improper conduct.

facts alleged by the plaintiff here are less severe than those found by the Law Court in the past to be insufficient to support an award of punitive damages. *E.g., Staples v. Bangor Hydro-Elec. Co.*, 629 A.2d 601, 602-03, 604 (Me. 1993) (employee criticized superior, who subsequently demoted him and accused him of sabotaging computer files; employee then terminated; no basis for finding high probability that superior's conduct motivated by ill will or so outrageous that malice could be implied); *Boivin v. Jones & Vining, Inc.*, 578 A.2d 187, 188-89 (Me. 1990) (plaintiff induced to leave another job by promise of employment through age 65 and "after that if he chose," then laid off less than two years later, not entitled to punitive damages). The plaintiff would not be entitled to an award of punitive damages on the proffered evidentiary showing made here and, thus, amendment would be futile.

For the foregoing reasons, I recommend that the defendant's motion to dismiss the plaintiff's demand for punitive damages be **GRANTED**.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 14th day of February, 2000.*

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*David M. Cohen  
United States Magistrate Judge*